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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 195

NORTHWESTERN ELECTRIC COMPANY

and

AMERICAN POWER & LIGHT COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

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Introductory Statement.

First of all, this is not a mere accounting case. The issues raised in our petition for certiorari, but ignored in the Commission's brief, deal primarily with considerations which are outside the accounting function. Indeed, the decision of the court below so gravely misconstrued Section 301(a) of the Federal Power Act as to hold, in effect, that the Federal Power Commission, by reason of authority as

to accounting alone, may exercise plenary power over the affairs of a locally regulated utility company, ousting the State courts of jurisdiction and nullifying their judgments. The ambit of the Commission's statutory authority has been grossly exceeded and the Commission's order "as applied to the facts before it and viewed in its entirety" produces a shockingly "arbitrary result". *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575, 586.

Argument.

I.

The Commission's brief asserts that we attempt to argue all the questions which would be open if the Commission's original order were before this Court and relies primarily upon the plea of *res judicata*. The Commission cannot enter such a plea in this proceeding. Interpreting *its own order* before the lower court, it framed the issues to exclude the question of disposition from the scope of the lower court's first judgment; it presented and relied upon the claim that "the question of the disposition of $3,500,000, therefore, is not properly before the court," and it is estopped from asserting that the judgment of the lower court on the first review determined that said amount of $3,500,000 must be written out of the accounts of petitioner, Northwestern Electric Company.

The order which called the original hearing before the Commission only directed Northwestern to show cause why the Commission "should not find and determine by order that adjusting entries be made to bring the books of account in conformity with" a report prepared by the Commission's staff (R. 3). And that report had actually recommended that the amount of $3,500,000 here in question "be

retained in Account 107, Electric Plant Adjustments, pending the submission to the Commission of a plan for its disposition" (R., Vol. III, Ex. 3, p. 29).

Northwestern's application to the Commission for rehearing (R., Vol. I, pp. 91-100) specifically urged that the question of disposition was outside of the scope of the Commission's order to show cause and the issues of the hearing and that the ordered disposition was without due process of law. The Commission's order on application for rehearing, dated January 21, 1941, directed that "a rehearing be held * * * for the purpose only of permitting the presentation of a plan of disposition of the amount of $3,500,000 * * *." Northwestern filed with and served upon the Commission an application asserting that it was "unable to determine from the provisions of said order of January 21, 1941, whether the Commission intended thereby to provide or did provide that the issues of such rehearing include all questions appropriately related to the retention in or disposition from said Account 107 of the amount of $3,500,000 and the manner and character of any disposition which may or should be ordered." (R., Vol. I, p. 122). The petition for review of the original order of the Commission, in assignments of error IX-10, 11, 12, X and XI, fully pleaded the invalidity of the action of the Commission in ordering disposition of said amount of $3,500,000 and vigorously contended that this portion of the order must be set aside (R., Vol. I, pp. 115, 128-131).

In brief and oral argument the Commission contended that the issue of disposition was not before the court. And it was successful in its endeavor to avoid judicial consideration of the disposition question. In its opinion (R. 819), the lower court said: "With respect to the common-stock item a rehearing of the Commission's order was granted

but not decided. Until decided there is no order to review here. '*Fed. Power Comm'n* v. *Edison Co.*, 304 U. S. 375, 383." Thus, *by the lower court's own decision*, upon the first review, it was established as the law of the case that no phase of the question of disposition was then before that court.

The position now taken by the Commission is in direct conflict with its contentions, both in its brief and on oral argument, which led the lower court to hold that the question of disposition was not then (upon the first review) before that court. Among other things, the Commission's brief (pp. 44-49) then urged:

> "On January 9, 1941, Petitioner filed an application for rehearing on the Commission's order of December 6, 1940 (R. 79). On January 21, 1941, the Commission ordered that a rehearing be held on February 10, 1941, 'for the purpose only of permitting the presentation of a plan of disposition of the amount of $3,500,000 write-up which the Commission, in paragraph (2a) of its order of December 6, 1940, ordered Northwestern to make disposition of, • • •' (R. 113). On December 30, 1940, the Commission stayed that portion of its order which required the disposition of this amount 'pending an application for rehearing herein • • • and the decision of the Commission upon such application for rehearing' (R. 112). A rehearing was held on March 3 and 4, 1941, and an oral argument was had before the Commission sitting *en banc* on May 21, 1941. No order has yet been entered by the Commission as a result of the rehearing and its own stay of its order requiring disposition is still in effect.

[1] This was the case chiefly relied upon by the Commission in this connection; see p. 5, *infra*.

"Inasmuch as the Commission has granted a rehearing and has not passed upon the questions raised therein, the administrative process has not been completed. The question of the disposition of $3,500,000, therefore, is not properly before the Court.

"The decision of the Supreme Court in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 381-383, is controlling here. * * *

"It follows that the same reason which prevents the running of the time for taking the appeal, prevents this court from acquiring jurisdiction; i. e., *because jurisdiction continues in the Commission to modify, reverse, or affirm its decision.* Upon the filing of its appeal in this court—its petition for rehearing being then undisposed of—appellant occupied the anomalous position of asking the Commission for administrative relief, and at the same time asking the court for judicial relief from the anticipated decision of the Commission. * * *

"Finally, even if this court did have jurisdiction over the appeal, a situation would be presented calling for the exercise of judicial discretion to determine whether relief should be denied at this stage of the proceedings, until all possible administrative remedies had been exhausted; and in our opinion the appeal should be dismissed for that reason in any event. We have heretofore suggested that rehearings should be availed of by aggrieved persons both for their own protection, and in order to afford opportunity to the Commission to correct errors or to hear newly discovered evidence before appeal. This is not and should not be an arbitrary requirement. Whether a petition for rehearing should be filed in a particular case must be decided on the merits as each case arises. However, in our view, its use as an administrative remedy should not be discouraged, but instead should be encouraged—'not to supplant, but to supplement' appellate re-

> view. * * * *Until the Commission has considered and acted upon such a petition, the administrative remedy of the aggrieved person cannot properly be said to have been exhausted, and resort to this court in such cases is, therefore, premature*" (emphasis supplied).

In the case of *American Tel. & Tel. Co.* v. *U. S.*, 299 U. S. 232, this Court held that the Communications Commission's interpretations of its accounting regulations and orders were binding upon it and could be relied upon by the public. On the basis of such an interpretation, this Court sustained the propriety of placing certain amounts in an account similar to Account 107, although it indicated that such reclassification of the amounts involved would have been unconstitutional if the regulations of the Communications Commission had been interpreted to require automatic disposition. Certainly the public, affected by the regulations and orders of the Federal Power Commission, is entitled to rely upon its interpretation of its own orders, and whether the lower court on the second review intended to reverse the position which it took on the first review or lost sight of its original holding, petitioners have been denied their right to judicial review, as argued beginning at page 31 of our supporting brief.

If we adopt the Commission's interpretation of its own order, as the court below did on the first review, then the Commission's administrative function to reverse, modify or otherwise change its order as to the disposition item, upon and after further hearings, was not exhausted until, after the rehearing, it had rendered an opinion and entered an order with respect thereto. The Commission's order of January 21, 1941, which granted a rehearing as to the matter of disposition, did not preclude the possibility that

the $3,500,000 might be classified in another account or that it might be allowed to remain in Account 107, even though bearing the "write-up" label. This would not have violated the Commission's original cost accounting system, unless the mere reclassification of any sum in Account 107 is tantamount to an automatic write-off, without regard to asset values, in violation of the petitioners' constitutional rights. *American Tel. & Tel. Co.* v. *U. S.*, *supra*.

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis* v. *Wakelee*, 156 U. S. 680, 689.

See also: *Michels* v. *Olmsted*, 157 U. S. 198, 201; *United States* v. *Chicago, Milwaukee R. Co.*, 282 U. S. 311, 342.

Furthermore, the right of petitioners to have this Court pass upon what patently are important constitutional questions, in spite of the Commission's maneuvering to prevent such a determination, is abundantly clear even if we accept, for purposes of argument, the current contention of the Commission that only the method of disposition was before the lower court upon the second review.

The Commission was fully informed that petitioners contended that no sum placed in Account 107 could be written off Northwestern's fundamental books of account if the value of its assets was sufficient to support its capital structure. That the Commission was abundantly aware of our position is shown by the following statement made in its order of January 21, 1941:

> "That this grant of rehearing shall not be construed as acknowledgment by the Commission that the character of evidence set out in the application for a rehearing is considered relevant and material to the issue at rehearing" (R. 113).

At the time such order was entered, it thus was apparent that the Commission intended to allow the offer of testimony as to the value of Northwestern's property for the express purpose of raising the constitutional issue.

There certainly can be no question but that the Commission's present repudiation of its clear and definitive interpretation of its original order, coupled with the Circuit Court's disregard both of that interpretation and of its own adoption of that interpretation on the first review, denies the petitioners judicial review of a vital constitutional question and therefore violates the due process clause. And in all events, any consideration of a method or plan which requires the writing off of amounts fully supported by existing asset values inherently raises the question of deprivation of property without due process.

II.

This case does not deal solely with accounting, as the Commission's brief implies. The challenged order goes beyond the scope and function of accounting, and the brief in opposition does not present grounds for denial of our petition for certiorari. The brief fails to disclose reasons why the questions presented, involving a determination for the first time by this Court of conflicts between the asserted authority of the Commission and state law or state regulation, should not be considered. The possible or probable conflicts are many and concern each of the states and involve a large part of the electric industry. The brief

in opposition does not even consider whether the Commission, instead of state authority, controls the fundamental accounts of public utilities, or the Commission's disregard of state laws, or the extent to which the Commission may exclude state authority, regulatory or judicial, or the Commission's unwarranted disregard of the existing surplus of Northwestern or its arbitrary requirement that disposition of the $3,500,000 be made only out of future earnings.

The twice repeated quotation (Commission's brief, pp. 7 and 11) of the statement of counsel for Northwestern that "our only plan of disposition, if you want to call it that, was one of indisposition to do anything about it" is both elliptical and unfair. The statement of counsel which immediately followed that quoted by the Commission's brief was, "In other words, our plan of disposition was a plan of retention, of keeping that there, which is our position now, that that is an asset, that there are assets that we value on the asset side of the balance sheet to match the liabilities, including the three and a half million dollars that is on the other side" (R. 1080). Nor does the refusal of petitioners to suggest any form of disposition other than that of retaining the $3,500,000 in Account 107 make applicable the criticism suggested in *Alabama Power Company* vs. *Federal Power Commission*, 128 F. (2d) 280, since the Alabama case involved a licensee which was under both statutory and contractual obligation to see that its accounts reflected the original cost of its licensed projects. The denial of certiorari in that case therefore involved neither an interpretation of the statute nor any constitutional question.

American Tel. & Tel. Co. v. *U. S.*, *supra*, is likewise not authority for the statement (Commission's brief, p. 9) that the lower court's approval of the mere transfer of the $3,500,000 in question to Account 107 determined the Commission's power to dispose of that amount arbitrarily. On

the contrary, the decision in that case indicates that to treat disposition as an inevitable consequence of reclassification to Account 107 is arbitrary and invalid. The Commission was unable to cite in the court below, and is unable to cite here, a single court decision holding that any portion of the capital accounts of a public utility (as distinguished from a licensee under the Federal Power Act) may be required to be written off or written down where they are fully supported by the value of its assets. Precisely that question was presented to the court below. It was not passed upon, either on the review of the Commission's original order or on the review of the disposition order. The petitioners clearly are entitled to have this question decided.

No argument urged either in the opinion of the court below or in the Commission's brief in opposition to our petition for certiorari has even approximately answered our contention that American Power & Light Company, as the owner of Northwestern's common stock, has suffered a taking of its property without due process. Aside from the fact that the issue of disposition was not before the lower court upon the first review, American was not a party to that proceeding and it cannot be said to have had its day in court with respect to the taking of its property rights. The Commission's brief (p. 12) baldly asserts, without citation of authority and without pertinent reference to the record, that American's purchase of Northwestern's common stock (in an arm's-length transaction involving some 490 holders of such stock; Ex. 88, R. 933-964) at a cost of $5,021,799.33 is "irrelevant in this proceeding." Why and how is that fact irrelevant? Why was American permitted to become a party to this proceeding if not to defend that investment? Perhaps such an investment is irrelevant in the eyes of a commission which is at once prosecutor and judge and which is intent upon its own

concepts, but it is poignantly and peculiarly relevant to the stockholders of American.

It has not been urged—and, in the light of the record, could not be urged—that Northwestern's common stock is without very real and substantial value when measured by any of the orthodox yardsticks. Furthermore, the lower court's opinion recognizes that the order of the Commission will decrease the market value of such stock, "probably substantially" (R. 1240).

The Commission's order requires American to forego all dividends on Northwestern's common stock until, to use the Commission's own language, there has been obtained "from the holders of the common stock (the holding company) a consideration of $3,500,000 for the stock", *i. e.*, until American has paid for the stock $5,021,799.33, plus $3,500,000, or a total of $8,521,799.33. The effect of the order thus is to destroy or gravely impair the value of American's present investment in such common stock. And yet, in the teeth of this language from the Commission's own opinion, its brief in opposition to our petition for certiorari asserts (p. 12) that its required revamping of Northwestern's capital structure is "in no way analogous to a corporate reorganization"!

In short, the Commission's brief has not answered petitioners' contentions that this case presents important Federal questions which have not been, but should be, settled by this Court, that the decision of the lower court is in conflict with the decisions of this Court in *American Tel. & Tel. Co.* v. *U. S.*, *supra*, and in *Consolidated Rock Products* v. *Du Bois*, 312 U. S. 510, and that the lower court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is again respectfully urged that our petition for writ of certiorari should be granted.

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